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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1888.

No. 136.

FREDERICK W. BAUER, A MINOR, BY HIS NEXT FRIEND WILLIAM BAUER, WHO SUES FOR THE BENEFIT OF HIMSELF AND THE SAID FREDERICK BAUER AND HIS MOTHER MINNIE BAUER, PLAINTIFFS IN ERROR,

vs.

THE TEXAS & PACIFIC RAILROAD COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF ARKANSAS.

FILED OCTOBER 16, 1885.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, JULY 31, 1888.

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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the circuit court of the United States for the eastern district of Arkansas, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, between Frederick W. Bauer, who is a minor, by his next friend, William Bauer, who sues for the benefit of himself and the said Frederick Bauer, and his mother Minnie Bauer, plaintiffs, and the Texas and Pacific Railroad Company, defendant, a manifest error hath happened, to the great damage of the said plaintiffs, as by their complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and custom of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 1st day of July, in the year of our Lord one thousand eight hundred and eighty-five, and of the Independence of the United States the one hundred & ninth year.

[The Seal of the Circuit Court, Arkansas District, U. S. A.]

RALPH L. GOODRICH,
Clerk of the Circuit Court of the United States of America for the Eastern District of Arkansas.

Allowed by—
HENRY C. CALDWELL,
U. S. Dist. Judge.

2 The execution of the within writ of error appears from the schedule hereto attached.

RALPH L. GOODRICH, *Clerk.*

3 Be it remembered that on the second day of October, 1884, came into the office of the clerk of the circuit court of the United States for the eastern district of Arkansas Fredrick W. Bauer, minor, by his next friend, William Bauer, sueing for himself and Fredrick W. Bauer *Bauer* & his mother, Minnie Bauer, by Clark & Williams, Esq's, his attorneys, and filed therein his complaint against The Texas & Pacific Railroad Company; which complaint is in the words and figures following, to wit:

U. S. Circuit Court, Eastern District of Arkansas.

FREDRICK W. BAUER, who is a Minor under the age of Twenty-one Years, by his Next Friend, William Bauer, who Sues for the Benefit of Himself and the said Fredrick Bauer and his Mother, Minnie Bauer,

vs.

THE TEXAS & PACIFIC R. R. Co.

4 The plaintiff, Fredrick Bauer, a minor, by his next friend, William Bauer, who sues for use of himself & his mother, Minnie Bauer, states that The Texas & Pacific Railroad Company is a corporation organized & existing and doing business under the laws of Texas, a foreign-, and the said corporation and the stockholders or owners thereof are citizens of the State of Texas; that said corporation is authorized and empowered to operate a railroad from Texarkana, on the line between the State of Arkansas & Texas, into various parts of Texas, connecting with the St. L., I. M. & S'n R'y at Texarkana; that said defendant company are and were at the time of the injury and death of the said Fredrick Bauer, dec'd, as hereinafter stated, doing a regular business within the State of Arkansas by running their trains and cars for a long distance within the yard of the said St. Louis, Iron Mountain & Southern
5 railway and receiving and discharging freight & passengers there and by having regular officers and agents at Texarkana to engage and receive and discharge freight and passengers and transact other business for the defendant in said State of Arkansas.

That on or about the 14 day of June last, A. D. 1883, Fredrick Bauer, deceased, was in full life and was in the employ of the St. Louis, Iron Mountain & Southern R'y and doing duty as car inspector of said company at the depot & within the yards of said company at Texarkana; that the business & duty of said Bauer, as such employee, was to inspect the wheels and running apparatus of the various trains of cars of the said St. Louis, Iron Mountain and Southern R'y as they arrived and departed at their said depot and within their yards at Texarkana; that in the performance of said duties the said Bauer was necessarily compelled to pass & repass and to be almost incessantly upon one or the other of the tracks
6 of the said company, of which there is & was at that time ten or twelve running parallel to each other; that while so engaged in the performance of his duties as such car inspector, to wit, on the day & year aforesaid, one of the defendant's locomotives, with its tender attached, came backing through the yard upon one of said tracks, being permitted so to do by the St. L., I. M. & S'n R'y, and without any knowledge or reason to know of the proximity of the said locomotive and tender on the part of said Bauer, and without any want of due care on his part, run over & killed the said Bauer; and he alleges that said injury and death was inflicted in broad day-light; that there was no person on the engine and tender except the engineer, at his post; that there was no person on

the tender to keep a lookout upon the track; that at the time there were four or five trains running to & fro on the various tracks, occasioning so much noise that it was impossible for the said
7 Bauer to hear the approach of the said engine and tender, and that the sole & proximate cause of the said injury & death was the negligence & want of due care on the part of said defendant company & her employees.

The plaintiff alleges that he & his said mother are the sole next of kin of the said deceased; that there is no administrator upon his estate; that the said deceased was a man of good health and strong physical power, about — years of age; that the said plaintiff, Fredrick, Jr., is the sole heir-at-law and the said Minnie is the widow of the said Fredrick, deceased, and they are the sole next of kin of the said deceased, and were dependent on him for their support and the education of the said Fredrick; that there is no administrator or personal representative of the said deceased.

They allege that the said widow and next of kin of said deceased are damaged by the reason of the said killing in the sum of twenty thousand dollars; wherefore they demand judgment for that
8 amount & for other relief.

SOL. F. CLARK,
Att'y for Pl'tff.

Filed and issued October 2, 1884.

RALPH L. GOODRICH, *Clerk*,
By W. P. FIELD, *D. C.*

CLARK & WILLIAMS.

9 UNITED STATES OF AMERICA,
Eastern District of Arkansas:

Be it remembered that at a circuit court of the United States of America in and for the eastern district of Arkansas, begun and holden on Monday, the 13th day of April, anno Domini one thousand eight hundred and eighty-five, at the United States court-room, in the city of Little Rock, Arkansas, the Honorable Henry C. Caldwell, district judge, presiding and holding said court, the following proceedings were had, to wit, on April 15th, 1885:

WM. BAUER, as Next Friend,
v.
THE TEXAS & PACIFIC R. R. Co.

Comes the defendant, by Dodge & Johnson, Esq'r's, its attorneys, and, on motion of said attorneys, leave is granted them until the 22 of April to file answer.

And on April 23, 1885, as follows:

WILLIAM BAUER *v.* TEXAS & PACIFIC R. R. Co.

Comes the defendant, by Dodge & Johnson, Esq'r's, its attorneys, & files herein its answer; which answer is as follows:

10 In the Circuit Court of the U. S., Eastern District of Arkansas.

WILLIAM BAUER, as Next Friend, &c.,

vs.

TEXAS & PACIFIC RAILROAD CO.

The defendant, for answer, says:

Admits that it is a corporation existing under and by virtue of the laws of the State of Texas, having its domicile in said State and operating a railroad located entirely in the said State of Texas.

Defendant denies that it owns or has in operation any part of its railway line in the State of Arkansas, or that it has any agent or representative in the State of Arkansas upon whom a summons in this suit could lawfully be served, and avers that the pretended service herein is not such service as is authorized by law, in this, that the person on whom said service was made is not an agent or officer or representative of this defendant, and that there is, therefore, no legal process requiring the defendant to appear and answer to this suit.

11 And, further answering, defendant denies that the injury stated in the complaint was caused by any negligence whatsoever of this defendant, its officers, agents, servants, or employees.

But defendant says that if said injury and damage, as stated in the complaint, occurred it was proximately caused and occasioned by the negligence and want of care on the part of the plaintiffs' intestate, Fredrick Bauer, deceased.

DODGE & JOHNSON,
Att'ys for Def't.

Filed Apr. 23rd, 1885.

RALPH L. GOODRICH, *Clerk.*

12 And on June 11, 1885, as follows:

FREDRICK BAUER, Minor, by his Next Friend, William Bauer, who Sues for the Benefit of Himself and the said Fredrick Bauer and his Mother, Minnie Bauer,

v.

TEXAS AND PACIFIC RAILROAD COMPANY.

Comes the plaintiff, by Clark & Williams, Esq's, his attorneys, & comes the defendant, by Dodge & Johnson, Esq's, its attorneys, and, the parties announcing themselves ready for trial, a jury comes, to wit, Gus. Hudson, Philip Pfeifer, Gus. Blass, W. N. Parish, M. M. Cohen, Louis M. Levy, J. A. Henry, Geo. H. Hyde, Geo. W. Martin, J. O. Frayser, Dunbar Pope, and A. J. Quindley, being twelve good and lawful men of the district, who were duly tried, impannelled, and sworn well and truly to try the issues joined between the

13 plaintiff and the defendant and a true verdict give according to the law and the evidence; and thereupon the jury proceed to hear the evidence, as well on part of the plaintiff as of the defend-

ant, and, having heard all the evidence and argument of counsel and having been charged and instructed by the court, consulted of their verdict and returned into court the following verdict: We, the jury, find the issues for the defendant.

It is therefore considered, ordered, and adjudged that the said plaintiff take nothing by his said writ, but be in mercy for his false complaint, and the defendant have and recover of and from said plaintiff all its costs herein expended, and have execution therefor.

14 And on June 26, 1885, as follows:

WILLIAM BAUER, Next Friend, &c.,
v.
TEXAS AND PACIFIC R. R. Co.

Comes the plaintiff, by Clark & Williams, Esq's, his attorneys, and files herein his bill of exceptions, which is signed by the court; which bill of exceptions is as follows:

U. S. Circuit Court, Eastern Dist. Ark.

FRED. BAUER, Plaintiffs,
vs.
TEXAS & PACIFIC R'Y, Defendants.

Be it remembered that on the trial of this cause the court on evidence decided the issue as to the jurisdiction of the court over the person of the defendant for the purposes of this action to be for the plaintiff and thereupon, a jury having been empaneled, the
15 plaintiff, in order to sustain the issue upon the merits in *her* behalf, read in evidence to the jury the following depositions:

16 FREDERICK W. BAUER, by Next Friend, Pl't'ff,
vs.
ST. L., I. M. & S. R'Y, Defendant.

EDWARD GALE, a witness for the plaintiff, testified as follows:

My name is Edward Gale. I am 34 years of age. I reside at Texarkana, Arkansas. I am a car repairer and now employed by the Texas and Pacific Railway Company. On the 14th day of June last I was here at Texarkana in the employ of the St. Louis, Iron Mountain and Southern Railway Company. I knew Frederick Bauer in his lifetime and was present in the Iron Mountain yard when he was killed. I saw him immediately after the engine passed over him. I helped pick him up and take him away. It was engine No. 653 of the Texas Pacific railway that run over
17 him. The engine was backing and the tender struck him first. The engine was in the Iron Mountain yard, backing north. Frederick Bauer was car inspector for the Iron Mountain Company at the time, and was inspecting a train of cars when he was run over—that is, he had just inspected a train of cars and the engine that run over him was running by the side of that train or very near it. The train that he inspected had just come in, and had

been in a few minutes—about long enough for him to inspect it. The engine that run over him was running on the track next to the one on which this train was standing, which had come in from the North. The engine and tender passed clear over him and I helped pick him up and take care of him. He was mashed through his hips and one of his legs was cut off. He lived about an hour and a half after being hurt and died from the injuries he received.
18 Frederick Bauer was a man about 30 years of age, I would suppose. There was a good many bells ringing and I did not notice whether this engine had the bell ringing or not at the time.

Cross-examination:

This engine was backing north on the main track. The track next to the main track was called the Chicago track, and that is the track upon which the train was standing that Bauer had been inspecting. The first end of this train was within about 60 yards of the depot. There is a space of about 8 feet—a good wide space—between the main track and the Chicago track. I had not seen Bauer before he was killed for some 15 or 20 minutes. The accident occurred in broad daylight, in the forenoon; can't say the exact time.

Re-examined:

The track we call the Chicago track is west of the main
19 track—that is, on the side towards town. There was one other track still west of the Chicago track at that place and several tracks east of the main track. There were various cars standing on the tracks east of the main track, but I don't know that there were any cars standing on the first track east of the main track.

Recross-examination:

When we picked him up it must have been four car-lengths from the north end of the train on the Chicago track.

WILLIS MCDONIEL, witness for the plaintiff, testified as follows:

My name is Willis McDoniel. I am 48 years of age. I live in Texarkana, Texas; am now in the employ of the St. Louis, Iron Mountain and Southern Railway Company. I was working for the same company at the round-house when Mr. Bauer was killed,
20 in June last year. He was killed by an engine running over him in the Iron Mountain yard on the main tract. It was a T. & P. engine that run over him. It was backing up from the depot, going north. I don't know what it was doing in the Iron Mountain yard or how it came to be there. Mr. Bauer was at that time working for the Iron Mountain Company as car inspector. There was one track west of the main track on which the engine was running, and I don't know whether there was a train standing on that track or not. I saw him when he was run over. I was

at the turn-table, still further north, and the engine was coming towards me or in that direction. I saw Bauer when he stepped on the track ahead of the engine coming towards me or in my direction. He was about the length of the tender ahead of the engine when he stepped on the track, coming in my direction, with his back to the engine. He came on
21 the track from the east side. I "hollered" at him and tried to make him hear, but he paid no attention. I called to him to look out, as I saw he was in danger, but he did not seem to notice it. He did not seem to know that the engine was behind him. After he got on the track he walked about 40 or 50 feet before the engine struck him. I called to him all the time, but he did not seem to hear me. I saw him after he was run over and helped to pick him up and take care of him. There were a great deal of noise in the yard at the time made by the cars running. I don't know whether there were any bells ringing or whistles blowing at the time or not. There were a great many cars on the several tracks in the yard, and some of them were being moved in various directions, and there was right smart rush at the time.
22 I did not see the whistle blow or the bell ring on the engine that run over him. If the whistle had blown or the bell rang I would have known it, as I was looking right in that direction. The engine was backing and the tender struck him first. I saw no one on the engine but the engineer. I could not tell that the engine slacked up any after Bauer stepped on the track. There was nothing to show to me that the engineer saw Mr. Bauer walking on the track. The engine was running slow about the yard rate of speed usual in the yard. I was from 30 to 40 steps from him when the engine struck him.

Cross-examination:

I was not paying particular attention to what the engineer was doing when I was halloing to Bauer to get off the track. I did not think particularly about the whistle blowing or the bell ringing at that time. My whole attention was directed to the danger
23 that Bauer was in. There were more trains in the yard that morning than usual and more of a rush than usual. I suppose there were five or six trains in that morning. Sometimes there would not be more than three trains in of a morning. There is a space of about ten feet from the main track to the next one west and about the same distance to the next track east.

ALBERT MIMICK, a witness for the plaintiff, testified as follows:

My name is Albert Mimick. I am 33 years of age. I reside in Texarkana, Arkansas. I am car repairer at the Texas & Pacific railway shop, at this place. I was in the Iron Mountain yard on the 14th of June last, and was present when Frederick Bauer was killed, and was about 60 feet distant at the time of the occurrance. He was run over by a Texas & Pacific engine which was
24 backing north in the Iron Mountain yard on the main track nearly opposite the round-house. At that point at that time

there were two tracks west of the main track and 5 tracks east of the main track. The first track west of the main track we call the Chicago track. There was a south-bound train that had just pulled in on the Chicago track, and there were several other trains moving on the other tracks at the time. On the second track east of the main track there must have been 20 or 25 cars moving at the time, and on other tracks other cars were moving in different directions, but there were no cars on the main track east. The T. & P. switch-engine was pulling cars in on that track and had left a gap at that place on that track. The engine run over Bauer about opposite the caboose of the train that had just come in on the Chicago track.

I think Bauer was car inspector at the time, and I think he
25 was aiming to inspect the train of cars that was moving south on the track east of the main track. I had seen Mr. Bauer about 15 or 20 minutes before he was run over by the engine, and he was there on or about the fourth track east of the main track inspecting cars on that track; that was morning, and was near the same place that he was run over. I did not see Mr. Bauer on the track before the engine passed over him, but saw him just as the pilot passed over him. He was badly bruised about the groins, one leg cut off, and a bad scar on his head. I was on a box car on another train, and we were running along about parallel with the engine that was backing up on the main track and on the third track from the main track and heard the engine on the main track blow its whistle four or five times, and I looked to see what she was

whistling for, and then saw Bauer's body coming out from
26 under the pilot of that engine; that engine was running very slow, about four miles an hour. The rules allow them to run 6 or 8 miles an hour. I did not see but one man on the engine, and that was the engineer, I suppose. I did not see any fireman. Probably about 20 minutes before this we had let this engine out of the coach track to go to Texas to take her train out, and a few minutes afterward she came back into the yard and up through the yard. I don't know what she came for or for what reason she came after. I last saw Bauer inspecting the cars, as I stated. Before he would have had time, I think, to inspect the train on the west side that had just come in before the accident—that is, the train on the Chicago track. At the time he was run over there was considerable noise in the yard from the movement of engines and cars. Our

engine was ringing the bell and popping off steam at the
27 same time. I mean the switch, engine that I was working on. Our engine was probably ten car-lengths from the engine that run over him at the time.

O. H. CARTER, witness for plaintiff, testified as follows:

My name is O. H. Carter. I reside in Texarkana, Miller county, Arkansas; am 53 years of age, and am car repairer in the employ of the St. Louis, Iron Mountain and Southern Railway Company. I was here on the 14th day of June last and employed by the same company and in the same business. I was present when Fred. Bauer was killed. He was killed by a Texas & Pacific engine, No.

653; I think a Mogul. She was backing down the main track in the Iron Mountain yard, in Texarkana. He was run over about 25 or 30 feet north of the oil-house and about opposite the round-house. There are two tracks west of the main track at that place.
28 One is known as the local track and the other the Chicago track. There was a train on the Chicago track that had just come in and been looked over—*i. e.*, inspected. There are some eight or ten tracks on the east side. When the accident occurred there was a train moving south on the transfer track and there was a train moving north also at the same time and other trains standing in the yard that had just come in. I won't be certain that the train going north at the time was moving. There was a more than ordinary rush of trains that morning; the yard was full. The night trains were all late that morning. There was a great deal of noise and more than ordinary rush of trains and more bustle than usual. I cannot tell what the T. & P. engine was backing up the yard after. I had crawled under the train on the Chicago track towards the main track when the T. P. engine went past on the main
29 track, and then I crossed over to the transfer track east, when I saw that some one had been run over by the engine. I found out that it was Bauer, and saw him in the shop where he was carried. I saw him some 3 or 5 minutes before he was hurt, and he was inspecting the train on the Chicago track; had been up one side and down the other to within 2 or 3 cars from the end. The next I saw him was after he was run over by the engine. The engine was not running very fast, I don't think. I did not notice any whistling or ringing of the bell, or who was on the engine. He died in the shop about an hour or an hour and a half after he was run over.

Cross-examination:

The rear end of the train on the Chicago track extended about 3 car-lengths north of the oil-house. The point where the engine ran over Bauer was about opposite the round-house. When I
30 last saw him, as before stated, he was on the west side of the main track, 2 or 3 car-lengths from the north end of the train, on the Chicago track, which he was inspecting.

WILLIAM BAUER, witness for plaintiff, testified as follows:

I am the brother of the deceased, Frederick Bauer. He was 29 years of age when he was killed. Physically, he was a stout, healthy young man, and was of sober, temperate, and moral habits. He had learned no special trade, but had been a railroad man for six years when he died. He could earn at least sixty dollars a month or two dollars a day. He could earn more than I could, for he was better educated. He died leaving one child, named Frederick W. Bauer, and a widow, Minnie Bauer. The child was nineteen months and the widow twenty-two years old. The child, F. W. Bauer, is the plaintiff in this suit. He, the deceased, had no other
31 next of kin but his widow and this child. Neither of them have any means of support except what the widow earns. They are now living with the widow's father, in Saline county, and

being supported by him. The deceased had been in the employ of the defendant for three years before he was killed, and had been employed at Texarkana for the time as inspector of cars. It was his duty to inspect all cars as they came into and went out of defendant's yard, and he had been doing this for three years before he was killed. The wages the deceased was getting was $60 per month, I think.

J. C. ATKINSON, witness for defendant, testified as follows:

My name is J. C. Atkinson. I am now in the employ of the Texas & Pacific railway. I was in the employ of the same company upon the 14th day of June last, 1883, and in the same capacity—
32 *i. e.*, as engineer, running a locomotive. I was the engineer of the locomotive that ran over Frederick Bauer on that day in the defendant's yards at Texarkana. There was nothing but the engine and no one on it but myself. The engine was backing down the yard on the main track in order to put the engine away in the round-house in the Iron Mountain yard. The Texas Pacific had no separate yard at Texarkana, but used the Iron Mountain yard and depot for its cars, and the yard was used jointly by both companies. The companies were run in connection with each other, but both belonging to the Gould system. Ever since the yards and roads were built it has been the custom of the T. & P. Company to use this yard and to stable its locomotives in the round-house. All the hands of the Iron Mountain Company knew that such trains and cars were accustomed to pass and repass in the yard. The round-house is near the north end of the yard, on the west
33 side, and about 4 car-lengths north of the oil-house. We had to go by the round-house in order to get into it, and then switch down to it. This engine had been taken out of the defendant's round-house that morning to the south end of the yard to take a train out to Texas, but the purpose of taking the trains out was abandoned and the engine ordered back to the round-house, and I was taking the engine back when the accident happened. I did not bring the engine out in the morning; that was done by the hostler. I took possession of her when she was hitched to the train. She was then let loose from the train and I took her back through the yard to the round-house. We ran over the man just before we got even with the round-house. I should say about two lengths north of the oil-house, which is about half way between that and the round-house. The turn-table is still farther north,
34 on the same side. I did not know Mr. Bauer. I saw persons in the yards and on the tracks ahead of me as I passed along, but do not know who they were. There are always persons in the yard. They cannot cross the yard without being on the tracks. They generally get off the track when a train comes along. I did not see Mr. Bauer on the track before the engine, before the engine ran over him, that I know of, for I did not know him. I saw no one on the track near enough to be in danger; none nearer than 50 or 60 yards. I should have slacked the speed if I had. My attention was first called by some one yelling or making a noise. I sup-

posed the noise was an alarm or that something was the matter, and immediately stopped the engine. We had then run over the man. I suppose it was Mr. Bauer. After we had stopped was
35 the first I knew of any one being in danger or being hurt. I was in my place in the cab of the engine. The way we were going the tender was ahead and first struck him. From my place in the cab a person could not be seen when first struck by the tender. To see any one ahead on the track the engineer would have to turn his head and look backwards over or by the side of the tender. I was going quite slowly and was keeping a lookout—I should say from 4 to 5 miles an hour, the yard time being six miles. I do not know that any one in the yard knew that this engine was coming back through the yard at this time. I gave three or four blasts of the whistle as I passed up, and was ringing the bell as usual when I heard the alarm. I do not recollect whether there was a train standing on the Chicago track. I think there was a train moving south on that track next east of the main track, and other
36 trains and cars on other tracks, but I can't say what. The accident happened in the forenoon; I can't say what time. There is always more or less rush and noise of trains in the yard at that time of day. I don't think there was more noise than upon any other day at that hour. The south end of the yard where I left the train is a half a mile or more from the round-house. I cannot say in what part of the yard I blew the whistle. I continued to ring the bell as I passed up through the yard.

CALAHAN, witness for defendant, testified as follows:

I was yardmaster, in the employ of the defendant company at Texarkana when Frederick Bauer was killed. I was about 100 yards south of where he was run over, between the main track and the next track east of the main track. I saw him as he
37 came out from under the engine. I knew nothing of how he came to get run over. There were several trains working in the yard at the time. I think there was a train on the Chicago track and one on the first track east of the main track, which the south engine was moving south, I knew deceased; he had been in defendant's employ for about 3 years, and *doing* that time had beeen car inspector of cars at Texarkana; his work was all done in the yard where he was killed, and he knew all about the passing and moving of trains in the yard. I have seen him inspecting cars daily when trains were passing and when not; he was a capable, competent man and knew his business well.

Thereupon plaintiff produced a witness and proved that the probabilities of life of the said Frederick Bauer at the time
38 of his death, he being twenty-nine years old, were, by the American experience tables, a little over 36 years; by the Carlisle tables, a little over 35 years, and by the North Hampton tables, between 29 & 30 years.

39 And thereupon the defendant read in evidence the depositions of witnesses following, to wit:

40 J. T. WHEDON, division sup't, testified as follows:

There are 8 feet between the tracks. If both trains were on at the same time there would be a clear space of 4 feet between them. The duty of inspector is to inspect cars. He must look out for trains. The custom is for inspectors to walk between tracks. A Mogut engine has 3 drivers and pony truck; it is much heavier than ordinary engines—12 tons heavier; 6 cars. If the tender were full of coal, couldn't see more than 30 feet ahead of it. It would be impossible to see the person on the track more than the length of tender ahead.

Cross-examination:

41 I don't know how this one was loaded; could see 30 feet if you looked over top; if looking out of side could see further.

42 Which was all the evidence in the case.

And thereupon the plaintiff prayed the court to give the following instructions to the jury:

If the jury find from the evidence that the deceased, Bauer, was killed in the yard of the St. L., I. M. & S. railway at Texarkana, in Arkansas; that he was car inspector for said company at the time, *time* charged with the duty and engaged in the work of inspecting cars as the trains arrived and departed; that it was in daylight when he was run over and killed; that he was so run over and killed by an engine & tender belonging to defendant company backing through the yard; that Bauer *that Bauer* had no reason to expect the said engine and tender in the yard at that time; that there were numerous trains of cars moving upon the several tracks

43 in the yard at the time, and much noise & confusion, caused by the ringing of bells, blowing of whistles, and running of cars; that there was no one on the engine that run over him, except the engineer in the employ of defendant railway, and that the engineer did not see Bauer until he was run over, then the jury will find the defendant guilty of negligence in running over him.

It is a question for the jury to determine whether or not the plaintiff is barred of his right to recover damages for the killing of Fred. Bauer, deceased, by reason of the contributory negligence of said Bauer, and in determining this question the jury should consider whether an ordinarily prudent man, under the circumstances and in like position, would have acted as the deceased was acting at the time he was killed.

44 It is not necessarily negligence for the employee of a railroad company, while engaged in the duty of inspecting the compan*ie*'s trains of cars as they arrive and depart in the compan*ie*'s yards, to be upon the track in the yard or to fail to see an approaching engine or cars, but the jury will consider such facts and circumstances and give them such weight iu considering of their verdict as, in their wisdom they shall deem just.

If the jury believe from the evidence that the engine and tender of the defendant, under control of its engineer, in passing through

the yard of the St. L., I. M. & S'n railway, carelessly and without proper caution on the part of said engineer, run over and killed the plaintiff's intestate, Fredrick Bauer, without contributory
45 negligence on the part of Bauer, then the jury will find for the plaintiff and assess his damages at such — as the jury may believe from the evidence has accrued and will accrue to the widow and next of kin of the said Fredrick Bauer, deceased.

But the court refused to give the instructions or either of them so prayed for, and the plaintiff at the time excepted to the decision of the court in refusing the same.

And thereupon the court, of his own motion, instructed the jury to the effect that the plaintiff had failed to make out a case for the jury to pass upon, and directed the jury peremptorily to render a verdict for the defendant; to which instructions the plaintiff excepted at the time.

And thereupon the jury, as directed, found for the defend-
46 ant, and the court gave judgement accordingly.

At the time of taking of *his* said several exceptions by the plaintiff time was given her by the court to prepare her bill of exceptions, and now, in order to save the benefit of the same, she tenders to the court this her bill of exceptions and prays that the same may be signed and sealed and made a part of the record of this cause, which is done accordingly.

HENRY C. CALDWELL, *Judge.*

And on July 2, 1885, as follows:

FREDERICK W. BAUER, as Next Friend, &c., *et al.*

v.

TEXAS & PACIFIC R. R. Co.

Come the plaintiffs, by Clark & Williams, Esq'r's, their at-
47 torneys, and file herein their citation and writ of error, which are signed and allowed by the court; which citation is as follows:

48 The United States of America — The Texas and Pacific Railroad Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the eastern district of Arkansas, wherein Frederick W. Bauer, who is a minor, by his next friend, William Bauer, who sues for the benefit of himself and the said Frederick Bauer and his mother, Minnie Bauer, — plaintiffs in error and you are defendant in error, to show cause, if any there be, why judgment rendered against the said plaintiffs in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Henry C. Caldwell, judge of the district court, this 1st day of July, A. D. 1885.

[The Seal of the Circuit Court, Arkansas District, U. S. A.]

HENRY C. CALDWELL.

JULY 2D, 1885.

We acknowledge legal service of the citation papers.

TEXAS & PACIFIC R'Y CO.
DODGE & JOHNSON, *Att'ys.*

49 UNITED STATES OF AMERICA,
Eastern District of Arkansas:

I, Ralph L. Goodrich, clerk of the circuit court of the United States for the eastern district of Arkansas, in the eighth circuit, hereby certify that the foregoing writings annexed to this certificate are true, correct, and compared copies of the original remaining of record in my office and constitute a complete transcript of the above-entitled cause.

In witness whereof I have hereunto set my hand and the seal of said court this 3d day of July, in the year of our Lord one thousand eight hundred and eighty-five, and of the Independence of the United States of America the one hundred and ninth.

[The Seal of the Circuit Court, Arkansas District, U. S. A.]

RALPH L. GOODRICH, *Clerk.*

Endorsed on cover: E. Arkansas C. C. U. S. No. 136. Frederick W. Bauer, a minor, by his next friend, William Bauer, who sues for the benefit of himself and the said Frederick Bauer and his mother, Minnie Bauer, plaintiffs in error, *vs.* The Texas & Pacific Railroad Company. Filed October 16, 1885.

No. 136.

In the Supreme Court of the United States.

OCTOBER TERM, 1888.

FREDERICK W. BAUER, *a minor, by his next friend, William Bauer, who sues for the benefit of himself and his mother, Minnie Bauer,*—PLAINTIFFS IN ERROR.

v.

TEXAS & PACIFIC RAILROAD COMPANY.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF ARKANSAS.

APPELLANTS' BRIEF.

PRESS PRINTING CO., LITTLE ROCK, ARK.

No. 136.

In the Supreme Court of the United States.

OCTOBER TERM, 1888.

FREDERICK W. BAUER, *a minor, by his next friend, William Bauer, who sues for the benefit of himself and his mother, Minnie Bauer,*—PLAINTIFFS IN ERROR.

v.

TEXAS & PACIFIC RAILROAD COMPANY.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF ARKANSAS.

APPELLANTS' BRIEF.

This is a suit to recover damages for the careless killing of Frederick Bauer, in the yard at the depot of the Iron Mountain Railroad Company, at Texarkana, in Arkansas, on the 14 day of June, 1883.

In the outset it should be remarked that the deceased was not an employee of the defendant, the Texas & Pacific Company, at the time he was run over by their engine and tender.

We shall, therefore, not have to be tortured with the stereotyped argument that he assumed the risk of the damages incident to the business in which he was employed. Nor was he a stranger upon the track, where he had no business to be. He was not a trespasser there, nor was he where the defendant company had a right to a clear track. Had this distinction been taken and effect given to it, it is impossible to conceive that the court would have taken the case from the jury. Had Bauer been a stranger upon the track at a place where the trains were accustomed to run with speed—where no one is expected to be—where the train hands are not bound to keep any special look-out—the decision would have been well enough, for it cannot be negligence not to see a man where men are not accustomed to go and where they are trespassers, and where the company has a right to a clear track, and where it is necessary for them to run with speed.

1st Thompson's Neg., notes 448 and 449.

In such a case, the failure to see such a trespasser, in broad day light, is not negligence, because the man has no business there; because the company is under no obligation to know that he is there, and because the public interest demands that the company's track should be clear, and that its trains should run with great speed, and consequently the law is well settled that in such a case the company is guilty of actionable negligence only where the man is seen by the engineer in time, and with opportunity to avoid his injury, and fails to do so. In other words, in such a case the sole obligation is on the man to see the train and get out of the way, and the company is liable for nothing but a wilful wrong. This is common sense, common logic and common law.

But Judge Caldwell says that Bauer, in this case, comes within this rule of law and reason—that there was no obligation on the company to see men on the track, but that the sole obligation rested upon Bauer, and he must get out of the way at his peril. We have no language strong enough to condemn such a doctrine. If this be the law, then individuals have no rights, and corporations can do no wrong.

We assign for error that the court erred in instructing the jury, peremptorily, to find for the defendant and in refusing each and all of the plaintiffs' four instructions.

Pages 12 and 13, printed transcript.

And there seems to be no other material questions in the case. But to determine these, it is necessary to look at the testinony in its true light.

Bauer was in the employ of the St. Louis, Iron Mountain & Southern Railway as car inspector. The character of his business is material. It was his duty to inspect each train of cars as they came in and went out. He was killed on the main track. There were two tracks west of the main track, and some five or six east of it. Trains were at times on all of these tracks. It was utterly impossible for him to perform his duties without crossing and being constantly upon these tracks. It was, therefore, not only his duty but his right to be on the track in the performance of the work he was employed to do. Now what is the true purport of the testimony? He was on the east side of the main track inspecting cars, and when the train came in from the north on the Chicago track, he crossed over the main track to the west side to inspect that

train. He passed down along the train on the west side to the south end, then back north along on the east side, in the performance of his duty of inspecting that train. That done, he started eastward and northward across the main track to inspect trains on the east side. In doing so he did not go square across, probably because the trains he was going to inspect were farther up the track, and so it was necessary for him to walk a short distance parallel to the track, and in doing so he walked upon the track, and when doing so he was run over and killed by this wild-cat engine and tender backing through the yard. By wild-cat we mean not being on any schedule or regular time, and at a time not known to any one. Not an employe in the yard knew, or was under any obligation to know, that this engine was coming. Now, if Bauer in crossing had stepped upon the track so close to the engine that the engineer could not check up in time to save him, the company would have been excused; but nothing is farther from the fact. The witness Willis McDaniel, the only person who saw him at this particular moment, says that he walked upon the track forty or fifty feet and was about the length of the tender ahead of the engine when he stepped upon the track; *i. e.* he was far enough ahead of the tender when he got on the track to walk fifty feet before the engine overtook him.

See Printed Transcript, page 6.

Here was ample time for the engineer to see him, but the engineer swears that he did not see him on the track, and not until the train had run over him. It is easy to see the reason why. He was sitting in his cab with his hand (probably) automatically upon the bell-rope, gazing around with his eyes

everywhere but upon the track ahead of him where they should be. We insist it was gross negligence in not seeing the man there. The obligation rested upon the company to keep a strict watch upon the track as we shall see. This obligation was violated, if it ever could be violated in any case. But it is not necessary to show that it was positive negligence, but only that the circumstances were such that it should have been left to the jury Now, the circumstances which make it a case for the jury are: 1st—That Bauer was attending to the business he was employed to do. That business made it imperative for him to cross and be on some of the tracks almost incessantly. 2nd—There was very much noise by the numerous moving cars on the tracks, whistles sounding and bells ringing, rendering it impossible for him to hear or distinguish a train coming on the main track, and which facts being known to the engineer, rendered it all the more obligatory in him to keep his eyes on the track. 3d—The engine and tender was a wild-cat train, coming up at a time not known or anticipated by any of the hands in the yard. *The engineer knew that his engine and tender were coming up through the yard—Bauer did not. This makes the difference.* But still more, the engineer knew that Bauer and the hands in the yard did not know that he was coming. This intensifies the duty of diligence that was due from him. 4th—The question of negligence, or no negligence, either on the part of Bauer or the company was not to be determined upon the basis that Bauer undertook to be responsible for dangers incident to his empolyment. He owed no duty to the defendant as a servant. 5th—It was in broad daylight, so that there is no such excuse as that he could not be seen.

We submit, in all confidence, that these facts and circumstances make an unquestionable case for the jury, both as to the question of negligence and contributory negligence. So far as the question pertains to defendants' negligence, it is certainly too plain for argument, and as to contributory negligence, there is nothing but the fact that he was on the track at the time he was run over. But this fact must be taken in connection with all the circumstances to which we have referred. The defendants have taken pains to show that there were eight or ten feet of distance between the tracks, and are vehement in their argument that Bauer was negligent in not walking in these spaces instead of upon the track. Slight reflection will show that such position is entitled to no weight whatever. These spaces are never cleared and made a path upon which to walk. All the rubbish that accumulates in the yard is thrown upon these spaces. The holes are never filled up. Any one who should attempt to walk any distance in such spaces would find himself stumbling over rocks, rotten ties, and pitching into mud holes. No one ever attempts to walk in these spaces. This is common knowledge. In order to take anything by this argument, it should have been shown in proof that the company had graded a path along these spaces for the employes to walk upon when necessary to walk up and down the tracks, and given orders for them to walk there, and not on the tracks.

We have stated our positions, now we propose to cite authorities.

Negligence by the defendant being established, contributory negligence is always a question for the jury where there are any paliating circumstances whatever.

Filee v. N. Y. Cent. R. R. Co., 49 N. Y., 47.
Greenleaf v. Ill. Cent. R. R. Co., 29 Iowa, 14.
Herrick v. Sullivan, 120 Mass., 576.

And this is always to be solved according to the circumstances attendant upon the transaction.

Penn. Canal Co. v. Bentley, 66 Penn. St., 30.
Height v. N, Y. Cent. R. R. Co., 7 Lans., 11.
Jenkins v. Little Miami R. R. Co., 2 Dis. (Ohio), 49.
Newhouse v. Miller, 35 Ind., 436.
6th Wait's Actions & Defences, 584, 596, and cases there cited.

The doctrine laid down by some authors that where the facts are undisputed, and the evidence is not conflicting, the case may be taken from the jury as a question of law, is wholly misleading, and seldom correct when applied to contributory negligence. For instance, in this case there is no dispute as to the fact that Bauer was on the track when he was killed. He could not have been killed otherwise. If his being there is coutributory negligence as a matter of law, independent of all reasons for his being there, then the doctrine is correct, and this is all upon which the defendants have to rely. They ask the court to ignore all the circumstances—all the reason for his being there, and the fact that he had no reason to expect that wild-cat train to be on the tracks, and determine the case upon the bare fact that he was there. We submit that this is not the true doctrine. The real issue is upon the circumstances of his being there. Negligence is always an inference from certain facts which are undisputed. This inference is the question. The inference itself depends upon

certain collateral facts, and if these facts and circumstances are undisputed, still if they are ambiguous in themselves, and of such a nature that reasonable men, unaffected by prejudice, might disagree as to the inference or conclusion to be drawn from them, then the case is for the jury.

The exact question was before the Supreme Court of Wisconsin, in a late case.

Hoye, as adm., v. Chicago & N. W. Ry. Co., 23d N. W. Reps., 14.

That case is on all-fours with this, and the law as above stated fully inculcated.

And see the same doctrine fully illustrated in

Kaples v. Orth, 21 N. W. Rep., 633,

and especially see the case of

Mark, adm., v. St. Paul M. & M. Ry. Co., 20 N. W. Rep., 131.

And these cases cite many late cases in various States by which their rulings are sustained. The following cases sustain to the fullest extent the same doctrine, and moreover prove that the company was guilty of actionable negligence by not keeping a lookout and not seeing Bauer on the track.

Townley v. Chicago, Milwaukee & St. Paul Ry. Co., 11 N. W. Rep., 55.

Johnson, adm., v. Chicago & N. W. Ry., 5 N. W. Rep., 886.

These cases establish conclusively: 1st—That Bauer's

being on the track was not negligence necessarily, but whether it was so was an inference to be drawn only by the jury. 2d —That the company was guilty of negligence by not providing for a lookout upon the track where Bauer was, and in not seeing him there. 3d—That the rule for determining negligence is to inquire whether the act was such as persons of ordinary prudence would, or would not, have performed. It is utterly impossible to say that any person, no matter what might be his character for prudence, would not have walked on the track exactly as Bauer did. It was no more imprudent than that of the boy in the case of Johnson, adm., v. Chicago & Northwestern Railway.

In the case of

Ireland v. Plank Road Co., 13 N. Y., 533,

Johnson, Justice, said:

"It by no means follows, because there is no conflict in "the testimony, that the court is to decide the issue between "parties as a question of law. The fact of negligence is very "seldom established by such direct and positive evidence that "it can be taken from the consideration of the jury, and pro- "nounced upon as a matter of law. On the coutrary, it is "almost always to be deduced as an inference of fact from "several facts and circumstances disclosed by the testimony, "after their connection and relation to the matter in issue have "been traced and their weight and force considered. In such "cases the inference cannot be made without the intervention "of a jury, although all the witnesses agree in their state- "ments, or there be but one statement, which is consistent "throughout."

In *Penn. R. R. Co. v. Burnett, 59 Pa. St., 263,*

The court say:

"Generally, what is, and what is not, negligence is a ques-
"tion for the jury. When the standard of duty is a shifting
"one, a jury must determine what it is, as well as find whether
"it has been complied with."

In *T. & P. R. R. Co. v. Murphy, 46 Texas, 366,*

It is said:

"Negligence is a quality attaching to acts dependent
"upon, and growing out of, the duties and relations of the
"parties concerned, and is as much a fact to be found by the
"jury as the alleged acts to which it attaches by virtue of such
"duties and relations."

See—

Smith v. Fletcher, L. R., 9th Exch., 64.
Kenworth v. Ironton, 41 Wis., 647.
In *Landhoff v. Ry. Co., 19 Wis., 479,*

It is said:

"Negligence is not a fact to be testified to, but can only
"be infered from the *res gesti* from the facts given in evidence.
"Hence it may, in general, be said to be a conclusion of fact
"to be drawn by the jury, under proper instructions from the
"court. It is always so where the facts, *or rather the conclu-*
"sion, is fairly debatable or rests in doubt."

Upon the authorities and the settled law on the subject as we believe, we asked the court to instruct the jury as follows, which he refused to do.

See *Printed Transcript, 12, 13.*

"It it is a question for the jury to determine, whether or "not the plaintiff is barred of his rights to recover damages for "the killing of Fred Bauer, deceased, by reason of the con- "tributory negligence of said Bauer, and in determining this "question, the jury should consider whether an ordinarily "prudent man, under the circumstances and in like position, "would have acted as the deceased was acting at the time he "was killed."

Either the principles laid down in all these authorities are at fault, or Judge Caldwell erred in refusing this instruction. Not only so, but the refusal of each of the other instructions asked for by the plaintiff, was equally as erroneous.

And we cite further the following cases, all of which bear directly upon the error in refusing these instructions, and in taking the case from the jury.

Ball v. N. C. Ry. Co., 15 Hun., 496.
Steele v. Central R. R. Co., 43 Iowa, 109.
Farley v. Chicago, B. & I. R. R. Co., 60 Iowa, 337.
Chicago, etc.. R. R. Co. v. Deynan, 56 Ill., 487.
Stultz v. Chicago, etc., R. R. Co., 44 Wis., 638.
Burns v. Chicago, R. I., etc., R. R. Co., 60 Iowa, 150.

It is manifestly not true that the engine and tender was not running at a greater rate of speed than four miles per hour, for at that rate Bauer would have escaped, even after he felt the touch of the car, and, if not, both engine and tender would never have gotten clear over him and mangled the body as they did before it was known that he was there. We think

this is stronger evidence of an improper rate of speed than the interested statements of the train hands who are always interested in swearing so as to exculpate themselves from all blame.

In conclusion, it may be stated, as a rule, with rare exceptions, that neither negligence, nor contributory negligence, can be predicated of an event reasonably uncxpected, because no one can guard against it.

See—

Hunter v. Wannamaker, 2 Centrol Rep., 70.

We make out the expected, and therefore clearly the negligence of the defendant, from the fact that its train was run at undue speed, without a proper outlook, into the joint yard of the defendant and the Iron Mountain Railroad, at a time when its engineer knew it would be unexpected, at a public place in a city where it should have been *expected*, that the employes of the two roads, as well as the citizens, would be congregated in the performance of their duties and business in reference to the trains which the proof showed had just arrived. On the contrary, the absence of contributory negligence of Bauer, deceased, is clearly manifest from the established facts: 1st—That the character of his duties required him to know, and that he did know, the regular time of the arrival of all trains, and the movement of locomotives through the yard, and that this locomotive which killed him had recently before left the yard for the purpose of pulling a freight train to some distant point in Texas. Therefore, its sudden return was, to him, reasonably unexpected, and the court erred in holding that the naked fact that he got upon the track at

all was, *per se*, such contributory negligence as barred the right of recovery in this case. In the reasonable course of events, the deceased was no more bound to anticipate that this locomotive would be upon the track at that time, than he was bound to anticipate that he would be struck by lightning, and if the ruling of the court below be correct, it is correct because, to be on a railroad track, at any time, place, or under any circumstances, is negligence, *per se*. We undertake to say that such a proposition is unsustained by reason or authority, and cite the following additional decisions in support of our contention; some of them of a very recent date, and all directly in point and in the teeth of the erroneous ruling in this case.

Thompson v. New York, Hudson R. R. R. Co., reported in 13 Central Reporter, 240, decided by N. Y. Court of Appeals, 26th June, 1888, reported August 16, 1888.

In that case held, the being on the track, or driving on it, was not, *per se*, contributory negligence, and the decision of the lower courts, holding (as here) that the recovery was barred by it, was reversed, and direction given to let the case go to the jury.

On the same day, June 26, 1888, the Court of Appeals of New York, in a case where a man was killed while standing on a track in the yard of the New York, Lake Erie & Western Railroad, under circumstances much like those disclosed in this case, was not as a matter of law guilty of contributory negligence, and reversed the decision of the Superior Court, which had affirmed the ruling of the trial court in non-suiting the plaintiff. The Court of Appeals held that a non-suit was

not warranted upon the bare fact that the party injured was upon the track in yard where trains *might pass*, and directed that the case be submitted to a jury.

Blaiser v. N. Y., L. E. & W. R. R., 13 Central Law Reporter, page 231, August 16, 1888.

The case will perhaps appear in 110 N. Y. Reports, and is an instructive case, to which we invite the attention of the court.

The question should generally be left to a jury.

Gulf C. & S. R. R. Co., v. Moore, 6 Southwestern Reporter, 631, decided by Supreme Court of Texas, November 18, 1887, reported February 20, 1888.

On that point see—

Louisville & Nashville R. R. Co. v. Stacker, 6 Southwestern Reporter, 737, decided by Sup. Ct. Tennessee, Dec. 10, 1887, reported March 5, 1888.

In that case the contributory negligence consisted in getting off a car while in motion.

In the case of

Hunter v. Wannamaker, 2 Central Reporter, page 70, decided January 25, 1886, by the Supreme Court of Pennsylvania

that negligence can only arise in reference to an act that might reasonably be foreseen as the consequence of a certain condition of things permitted to be (ice remaining on a sidewalk). That case sustains the proposition with which we began, that negli-

gence, and contributory negligence, could not be predicated upon the unexpected. This court has practically settled this case in the case of

Baltimore & P. R. R. Co., 95 U. S., 439.

Wherein the rule was announced that "negligence is the "failure to do what a reasonable and prudent person would "ordinarily have done *under the circumstances of the situation*, "or doing what such a person, under the existing circumstan- "ces, would not have done. The duty is dictated and "measured by the exigencies of the occasion." Tested by this rule, we had a clear case for the jury, for beyond question, when two minds might reasonably differ as to what is prudent, the case presents no longer a question of law, but one of fact. What should have been the conduct of a prudent man is a fact to be determined by those familiar with human affairs in every-day life. Whether Bauer acted prudently (complied with "the exigencies of the occasion") was a fact.

The same principle is recognized in

Continental Improvement Co. v. Stead, 95 U. S., 161.

The same is recognized as to contributory negligence.

Northern Pacific R. R. v. Herbert, 116 U. S., 642.

SOL F. CLARK,
SAM W. WILLIAMS.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1888.

No. 136.

FREDERICK W. BAUER, a Minor, by his next friend, WILLIAM BAUER, who sues for the benefit of himself and the said FREDERICK BAUER, and his mother, MINNIE BAUER,

Plaintiffs in Error,

vs.

THE TEXAS AND PACIFIC RAILROAD COMPANY,

Defendant in Error.

ARGUMENT FOR DEFENDANT IN ERROR,

BY

JOHN F. DILLON.

Burgoyne Quick Printing Co., Cor. Walker and Centre Sts., New York.

Supreme Court of the United States,

OCTOBER TERM, 1888. No. 136.

FREDERICK W. BAUER, a Minor, by his next friend, William Bauer, who sues for the benefit of himself and the said Frederick Bauer, and his mother, Minnie Bauer,
Plaintiffs in Error,

vs.

THE TEXAS AND PACIFIC RAILROAD COMPANY,
Defendant in Error.

Argument of John F. Dillon for Defendant in Error.

Statement of the Case.

This suit was begun in the Circuit Court of the United States, Eastern District of Arkansas. The cause of action alleged in the complaint was the injury and death of the plaintiffs' intestate caused by the negligence of defendant's servants in the particulars set forth in the declaration. The defenses set up in the answer were: (1) A denial of negligence on the part of the defendant or its agents, and (2) an averment that the injury was caused by the negligence of the plaintiffs' in-

testate. The Court below, after the evidence was in, instructed the jury to bring in a verdict for the defendant.

The case is brought to this Court on a writ of error. The alleged errors are the refusal by the Court below to give to the jury certain instructions which the plaintiff requested it to give, and the giving of the instruction that the plaintiff had failed to make out a case for the jury to pass upon, and directing the jury to render a verdict for the defendant (*Record, pp. 12, 13*).

The facts in the case were simple and undisputed. The plaintiffs' intestate, Bauer, was a car inspector in the employ of the St. Louis, Iron Mountain and Southern Railway Company, and his place of work was the railroad yard of that company in Texarkana, where he was at the time he was killed. The defendant company used that yard and the round-house therein in common with the St. Louis, Iron Mountain and Southern Railway Company. The plaintiffs' intestate, Bauer, was run over and killed in that yard by a locomotive belonging to and operated by the defendant company. Short extracts from the testimony of two of the witnesses furnish a sufficient narrative of the accident.

J. C. Atkinson, the engineer, who was in charge of the defendant's locomotive at the time, testified (*Record, p. 10*):

> "This engine had been taken out of the defendant's round-house that morning to the south end of the yard to take a train out to Texas, but the purpose of taking the trains out was abandoned and the engine ordered back when the accident happened. * * * The way we were going the tender was ahead and first struck him."

WILLIS MCDONIEL, a witness for the plaintiffs, testified *(Record, p, 7)*:

"I saw Bauer when he stepped on the track ahead of the engine coming towards me or in my direction. He was about the length of the tender ahead of the engine when he stepped on the track coming in my direction, with his back to the engine. He came from the east side. I 'hollered' at him and tried to make him hear, but he paid no attention. I called to him to look out, as I saw he was in danger, but he did not seem to notice it. He did not seem to know that the engine was behind him. After he got on the track he walked forty or fifty feet before the engine struck him. I called to him all the time but he did not seem to hear me. * * * I was from thirty to forty steps from him when the engine struck him."

The evidence not only failed to show any negligence on the part of the defendant company or its servants and agents, but, on the contrary, showed affirmatively that they exercised due care. The locomotive was running slow, within the prescribed and customary yard rate of speed; the engineer gave the customary signals by ringing the bell and blowing the whistle (indeed, the contrary is not even alleged or claimed in the declaration); and the engineer was keeping a lookout, and did not see Bauer because the latter was so near the tender of the locomotive (which was going backwards) when he stepped upon the track. The evidence, moreover, clearly showed that Bauer, himself caused his death by his own negligence in stepping upon the track without looking to see if there was danger in doing so, and by walking forty or fifty feet *on the track* without looking about him to see if there was danger, and that he did this in a busy railroad yard where cars and locomotives were constantly passing to and fro, as is usual in railroad yards, and that at the time when he did this there

was more than usual noise and confusion, ringing of bells and blowing of whistles, consequent upon an unusual rush of business at that time—all of which facts constituted a sufficient warning to any reasonable man, and establish the fact of Bauer's negligence beyond all question or dispute.

The evidence showed, also, that there was a space of eight or ten feet between the tracks on which space Bauer *might and ought to* have walked, on which a reasonably careful person *would* have walked, and on which it was customary for car inspectors to walk, instead of walking, as Bauer did without any necessity therefor, upon the tracks themselves.

ARGUMENT.

I.

The Court did not err in directing a verdict for the defendant.

(A) The rule is well established that when the evidence given at the trial, with all the inferences that the jury may reasonably draw from it, is insufficient to support a verdict for the plaintiff, then the Court ought to non-suit the plaintiff or direct a verdict for the defendant.

THIS COURT says:

"It is the duty of a Court in its relation to the jury to protect parties from unjust verdicts arising from

ignorance of the rules of law and of evidence, from impulse of passion or prejudice, or from any other violation of his lawful rights in the conduct of a trial. This is done by making plain to them the issues they are to try, by admitting only such evidence as is proper in these issues, and rejecting all else; by instructing them in the rules of law by which that evidence is to be examined and applied, and finally, when necessary, by setting aside a verdict which is unsupported by evidence or contrary to law."

"In the discharge of this duty it is the province of the Court, either before or after the verdict, to decide whether the plaintiff has given evidence sufficient to support or justify a verdict in his favor. Not whether on all the evidence the preponderating weight is in his favor; that is the business of the jury, but conceding to all the evidence offered the greatest probative force which, according to the law of evidence, it is fairly entitled to, is it sufficient to justify a verdict? If it does not, then it is the duty of the Court after a verdict to set it aside and grant a new trial. Must the Court go through the idle ceremony in such a case of submitting to the jury the testimony on which plaintiff relies, when it is clear to the judicial mind that if the jury should find a verdict in favor of plaintiff that verdict would be set aside and a new trial had? Such a proposition is absurd, and accordingly we hold the true principle to be that if the Court is satisfied that, conceding all the inferences which the jury could justifiably draw from the testimony, the evidence is insufficient to warrant a verdict for the plaintiff, the Court should say so to the jury."

Mr. Justice MILLER in *Pleasants vs. Fant*, 22 Wall., 121.

So, in another case, this Court says:

"It is the settled law of this Court that when the evidence given at the trial, with all inferences that the jury could justifiably draw from it, is insufficient to support a verdict for the plaintiff, so that such a verdict, if returned, must be set aside, the Court is not bound to submit the case to the jury, but may direct a verdict for the defendant."

Mr. Justice GRAY in *Randall vs. Baltimore and Ohio R. R. Co.*, 109 U. S., 482.

Again it says :

"If, after the plaintiffs' case had been closed, the Court had directed a verdict for the defendant, on the ground that the evidence, with all inferences that the jury could justifiably draw from it, was insufficient to support a verdict for the plaintiff, so that such a verdict, if returned, must be set aside, it would have followed a practice sanctioned by repeated decisions of this Court."

Mr. Justice MATTHEWS *in Baylis vs. Travellers' Insurance Company*, 113 U. S. 320.

See, also,

Bowditch vs. Boston, 101 U. S., 16, 18.
Anderson County Commissioners vs. Beal, 113 U. S., 227, 241.
Littlefield vs. Improvement Fund Trustees, 117 U. S., 415, 419.
No. Penn. R. R. Co. vs. Commercial Bank, 123 U. S., 733.

THE LAW IS SETTLED IN ENGLAND to the same effect.

"Formerly it used to be held that if there were what was called a *scintilla* of evidence in support of a case the Judge was bound to leave it to the jury. But a course of recent decisions has established a more reasonable rule, viz., that in every case, before the evidence is left to the jury, there is a preliminary question for the Judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the *onus* of proof is imposed."

Lord CHELMSFORD *in Giblin vs. McMullen*, L. R., 2 P. C., 335.
See also, *Wakelin vs. London and Southwestern Ry. Co.*, L. R., 12 App. Cas., 41.
Metropolitan Ry. Co. vs. Jackson, L. R., 3 App. Cas. 193.
Davey vs. London and Southwestern Ry. Co., L. R., 11 Q. B. D., 213.
Same Case on Appeal, L. R., 12 Q. B. D., 70.
Ryder vs. Wombwell, L. R., 4 Ex., 32.

ON THIS SUBJECT I may be permitted to add that, in 1875, I heard the late Chief-Justice of England (Lord COCKBURN) charge a jury in a negligence case like the present, brought under Lord Campbell's Act by the representative of a deceased employee against the company. The trial had occupied some ten days (being a test case), and the Chief-Justice said, with characteristic force and emphasis, to the jury, in substance:

"GENTLEMEN—It will not do to say broadly and generally there is negligence. The law requires the plaintiff to state in his declaration the facts on which he grounds his charge of negligence, and the jury must be able to put their fingers upon such and such a particular act or acts or omissions, and to say that such act or omission was the neglect of some duty which the company owed to the employee, which duty it failed to discharge, and which failure resulted in the injury, to which injury the employee did not on his part contribute."

Thus viewing the declaration in the present case and the proofs, I submit that this Court will hold, on reviewing the record, that the Circuit Court, instead of evading its duty and responsibility, met the same manfully, as it ought, and did not abdicate its highest and truest functions or timidly surrender them to the jury. It is a much easier thing to do the latter than the former. If the trial by jury is to maintain its place in our jurisprudence (as I think it ought) it will be only because Judges shall fearlessly exercise the duties of their high office, and not abdicate or surrender them to the jury. Therefore, in the interests of justice, quite irrespective of the fate or fortune of this particular case, I should deprecate any relaxation of the salutary rules heretofore laid down by this Court, and above quoted, or the assertion of any doctrine, or the giving

of any judgment *in this Court*, which would make the Circuit Courts timorous in the firm exercise of their duty (as the Court below discharged its duty) where the whole evidence showed no case fit and proper to go to the jury.

(B) The evidence given at the trial, with all the inferences that a jury might reasonably draw from it, was insufficient to support a verdict for the plaintiff.

1. THE EVIDENCE NOT ONLY SHOWED NO NEGLIGENCE ON THE PART OF THE DEFENDANT, BUT, ON THE CONTRARY, SHOWED DUE CARE.

It hardly needs to be stated that the burden is on the *plaintiff* to show *negligence*, and *not* on the *defendant* to show *due care*. In the present case (and this may be stated absolutely without qualification) there was *no evidence* whatever which showed or tended to show any negligence on the part of the defendants. On the contrary, the evidence showed affirmatively that the defendants exercised due care.

(a) The locomotive was running slow within the usual and prescribed yard rate of speed.

Testimony of WILLIS MCDONEIL, *Record, p. 7.*
" " ALBERT MIMICK, " *p. 8.*
" " O. H. CARTER, " *p. 9.*
" " J. C. ATKINSON, " *p. 11.*

Indeed, the contrary is not alleged in the declaration.

(b) The engineer gave the usual signals by ringing the

bell and blowing the whistle, and the contrary is not even alleged in the declaration.

See Testimony of J. C. ATKINSON, *Record, p. 11.*

No one contradicted the testimony as to either the blowing of the whistle or the ringing of the bell. There was, moreover, testimony by two of the witnesses for the plaintiff as to the ringing of *some bells.* EDWARD GALE testified (*Record, p. 6*): "There was a good many bells ringing." ALBERT MIMICK testified (*Record, p. 8*): "Our engine was ringing the bell and popping off steam at the same time."

It is true, there was testimony by some of plaintiffs' witnesses that *they did not notice* whether the bell was ringing or not.

Testimony of EDWARD GALE, *Record, p. 6.*
" " O. H. CARTER, " *p. 9.*

WILLIS MCDONEIL, a witness for the plaintiff, testified on direct examination:

"I did not see the whistle blow or the bell ring on the engine that run over him. If the whistle had blown or the bell rang I would have known it, as I was looking right in that direction" (*Record, p. 7*).

But on cross-examination he testified:

"*I was not paying particular attention* to what the engineer was doing when I was hallooing to Bauer to get off the track. *I did not think particularly about the whistle blowing or the bell ringing* at that time. *My whole attention was directed to the danger that Bauer was in*" (*Record, p. 7*).

Such testimony, "*I did not notice*" and "*I did not hear,*" is entitled to no weight in the face of positive, affirmative testimony that the bell was rung and the

whistle blown. It is not evidence at all. The want of probative force or of evidenciary value of such testimony has been well explained by BRAMWELL, B., as follows:

"The only thing relied on for that purpose is the statement of the plaintiff that he did not hear it (the warning). That is no evidence that it was not done. It is consistent with two things—one that it was not given, the other, though given, it was not heard. And when testimony is equally consistent with two things, it proves neither."

Per BRAMWELL, B., *in Ellis vs. G. W. Ry. Co.*, L. R., 9 C. P., 557.

In the present case the witnesses did not state even that they "*did not hear*" the bell, but merely that they "*did not notice*" whether the bell rang or not, and "*I did not think particularly* about the whistle blowing or the bell ringing at that time."

"As against positive, affirmative evidence by credible witnesses to the ringing of a bell or the sounding of a whistle, there must be something more than the testimony of one or more that they *did not hear it* to authorize the submission of the question to the jury. It must appear *that they were looking, watching and listening for it; that their attention was directed to the fact, so that the evidence will tend to some extent to prove the negative.* A mere '*I did not hear*' *is entitled to no weight in the presence of affirmative evidence* that the signal was given, and *does not create a conflict of evidence justifying a submission of the question to the jury as one of fact.*"

Per ALLEN, J., in *Culhane vs. N. Y. Cen. & H. R. R. Co., 60 N. Y., 133, 137.*

Aside from this, it is evident from reading the declaration that the plaintiffs did not claim as a ground of negligence on the part of the defendant that it failed to ring bells or give the usual signals; the contrary rather

is implied from the declaration, which states that the engineer was "*at his post*" (*Record, p. 2, fol. 6*).

(*c*) *The engineer was keeping a lookout.*

"I was going quite slowly and keeping a lookout" (Testimony J. C. ATKINSON, engineer, *p. 11, Record*).

And saw no one near enough to be in danger (Testimony of J. C. ATKINSON, *p. 10, Record*).

This is positive, *affirmative* evidence, and there is nothing to contradict it. It must, therefore, be accepted as true. (See *Culhane vs. N. Y. Cent. & H. R. R. Co., supra*). It was so accepted by the Court below.

The reason why the engineer did not see Bauer, the plaintiffs' intestate, was that Bauer stepped on the track about the length of the tender ahead of the locomotive (Testimony of WILLIS MCDONEIL, *p. 7, Record*), while the engineer could see the track for a distance no nearer than thirty feet from the tender if the tender was full of coal (as it probably was at the time, for the locomotive was about to start out with a train, when it was ordered back to the roundhouse), and no nearer than the length of the tender ahead in any case (Testimony of J. T. WHEDON, *p. 12, Record*). That the tender of a locomotive is less than thirty feet long is a fact which, while not in evidence, is so well known that it may be considered as a fact in this discussion. Granting, then, this fact, and the fact that the tender was full of coal, as it probably was at the time, it is obvious that the engineer could not see Bauer when he stepped on the track, and that was the only time when he could have seen him, for the engine gradually approached and finally overtook him.

But if it be not granted that the tender was less than thirty feet long, or that it was full of coal, still there was no evidence that the engineer *could* see Bauer (and there must be such evidence in order to show that the engineer was negligent in not seeing him). The engineer could see no nearer than *the length of the tender ahead* even if the tender was empty, and the testimony of McDoneil, the only witness who saw the accident, is that Bauer was "*about* the length of the tender head" when he stepped on the track. The reason why Bauer could walk so far as forty or fifty feet before the engine overtook him was that the engine was running very slow.

ALBERT MIMICK, a witness for the plaintiff, testified (*Record, p. 8*): "That engine was running very slow, about four miles an hour. The rules allow them to run six or eight miles an hour." Other witnesses testified that the engine was running slow (*supra, p. 8*). Four miles an hour is but little if any faster than a man would walk, while the fact that Bauer had perhaps twelve or fifteen feet start of the engine, in connection with the slow speed of the engine, fully accounts for the fact that Bauer walked so far before he was overtaken.

Just here it is proper to call the attention of the Court to the rule that *the burden of proof is on the plaintiff* to show that there was negligence on the part of the defendant, *and in just what such negligence consisted*, and that such negligence caused the injury. So far as the testimony in regard to the engineer's keeping a lookout is concerned: (1) There is no evidence whatever that the engineer did not keep a lookout; (2) the testimony of McDoneil is perfectly consistent with the fact that the engineer kept a look-

out; and (3) the engineer testifies affirmatively that he did keep such lookout.

The declaration contains the following allegation (*Record, pp. 2–3*):

> "That there was no person in the engine and tender except the engineer, at his post; that there was no person on the tender to keep a look-out upon the track."

The apparent object of this allegation was to charge the defendant with negligence in not having some person on the engine besides the engineer. But there was no evidence that there was any custom to have any person besides the engineer on the engine when it was in the railroad yard. There was, therefore, no evidence to show that the company failed to do anything in this respect that it ought to have done; in other words, there was no evidence of negligence in not having another person on the engine. Further, it *does* appear that the engineer fully performed all duties which the defendant company owed to persons in the railroad yard; and it does *not* appear that any such duty was in any degree neglected by reason of not having an additional man upon the engine. Any duty that such additional person could or ought to have performed in reference to persons in the railroad yard was fully performed by the engineer.

It clearly was not negligent to run a locomotive backwards in a railroad yard. It would be absolutely impossible to perform the business of a railroad if this were not done. It is the constant usage and the deceased knew it. It was necessary in the present case, for the turntable was at the north end of the yard according to the testimony of Willis McDoneil

(Record, pp. 6, 7), and the engine must of necessity run backwards through the yard before it could reach the turntable. But such a statement, as that it was not negligent to run a locomotive backwards in a railroad yard, is almost, if not quite, superfluous. It is common knowledge that such a thing must be done, and it is done with the greatest freedom at any time. The argument of the appellants that the engine was not run on "schedule time," &c., can scarcely be seriously taken. Who ever heard that it is negligence to run an engine in a railroad yard on any but "shedule time"? There is, to a great extent, no "schedule time," for the movements of engines and cars in a railroad yard. The burden of looking out for engines cars in such a place is upon the men who are employed on and about the tracks, and not upon the men on the engines to see the men on the tracks and to stop the engines if they do not get off when properly warned. It is not meant by this that the engineer may *recklessly* or *purposely* run over a man who is negligently on the track—not at all; but only, that if the engineer uses all proper and usual precautions, and runs his engine in the usual manner, the company cannot be held liable if a man chooses to put himself on the track and he is injured as a result.

Whether the bell on the defendant's locomotive was ringing or not, and whether there was a look-out or not (and the evidence is sufficient on both these points), the fact that there were several bells ringing, that there was much noise, and more than all else, the mere fact that Bauer was walking in a busy railroad yard, were warnings enough for any reasonable man. The engineer could not have done more than he did. He ran

the locomotive slow, within the customary yard rate of speed; he gave the usual warnings by blowing the whistle and ringing the bell; and he kept a look-out and saw no one on the track near enough to be in danger. The engineer could not see Bauer on the track, and did not know that he was there. He was as powerless to act as he would have been if Bauer had deliberately thrown himself beneath the wheels of the locomotive.

2. THE EVIDENCE DISCLOSES THE FACT THAT THE PLAINTIFFS' INTESTATE BROUGHT THE INJURY ON HIMSELF BY HIS OWN NEGLIGENCE. HENCE, ON THIS GROUND, ALSO, THE COURT BELOW WAS JUSTIFIED IN DIRECTING A VERDICT FOR THE DEFENDANT.

We submit this proposition to the Court with equal confidence as the proposition (above) that the evidence did not show any negligence as alleged in the declaration in the defendant.

Davey vs. London and Southwestern Railway Company was very much like the present case in its facts, and the reasoning in it applies with equal force to the present case.

"In the present case the plaintiff must therefore make out two things: First, that the defendants, through their servants, did or omitted to do something which a reasonably careful person would not have done or omitted to do; and Secondly, that the plaintiffs' injury was thereby occasioned. *It has certainly been determined in several cases, which have not been overruled, so far as I am aware, that if the plaintiff in attempting to establish his case, not only does not show any act or omission of the defendants from which the accident arose, but on the contrary does show that he himself caused the damage, then his case fails, because he proves affirmatively that he himself is the author of his own wrong. If, therefore, by the uncontradicted facts, on the truth of*

which the plaintiff must rest his own case, it is shown that the damage to the plaintiff was caused by himself, it seems to me that the learned Judge was right in nonsuiting the plaintiff, because he failed in sustaining the *onus* which he was bound to sustain, viz., of showing that the injury resulted from the defendants'. acts. *Now, it seems to me clear upon the uncontradicted evidence of the plaintiff himself, that he himself caused the accident by walking straight into a train which he might have seen.* He comes first upon the down line on which the train is not coming; there is the width of the down line, and the interval between the two sets of rails between him and the danger. *If he had only taken the precaution of looking to the left along the up line while crossing over this space he must have seen the coming train. He did not see what was plainly to be seen approaching, and in consequence he walked straight into the danger.*"

LORD COLERIDGE *in Davey vs. London and Southwestern Railway Co., L. R., 11 Q. B. D., 216.*

That there was a space between the tracks upon which Bauer *might* and *ought* to have walked, and upon which a reasonably careful man *would* have walked, is clear from the testimony of Edward Gale (*Record, p. 6*), of Willis McDoneil (*Record, p. 7*) and of J. T. Whedon (*Record, p. 12*). J. T. WHEDON testified (*Record, p. 12*):

"*The custom is for inspectors to walk between the tracks.*"

That there were many cars moving in various directions at the time, and consequently much noise, which facts were warnings to Bauer to use care, and in not regarding which he was negligent, is shown by the testimony of Willis McDoneil *(Record, p. 7)*, of Albert Mimick *(Record, p. 8)* and O. H. Carter (*Record, p. 9*).

Reasonable care in a railroad yard means constant

watchfulness. This was what Bauer failed to show, but on the contrary showed the utmost recklessness. The testimony of Willis McDoneil, a witness for the plaintiff (*Record, p. 7*), was to the effect that Bauer stepped on the track in front of the tender with his back to it, and without ever looking around, walked forty or fifty feet until the engine caught up with him. He did this in broad daylight, in a railroad yard, and at a time when many cars and locomotives were moving to and fro. It would be a work of supererogation to comment at length upon such conduct or to attempt to demonstrate that it was negligent. It speaks for itself. Whatever comment is necessary may be found in the similar case of *Davey vs. L. & S. W. Ry. Co.*, quoted *supra*.

3. BUT ASSUME (WHAT IS NOT ADMITTED TO BE TRUE) FOR THE SAKE OF THE ARGUMENT, THAT THE DEFENDANT WAS NEGLIGENT. THIS FACT ALONE WOULD NOT BE SUFFICIENT TO RENDER THE DEFENDANT LIABLE, NOR WOULD IT BE SUFFICIENT TO CAUSE A SUBMISSION OF THE CASE TO THE JURY UPON THE EVIDENCE. IT IS NOT ENOUGH TO SHOW NEGLIGENCE OF THE DEFENDANT, OR EVEN TO SHOW, IN ADDITION, THAT SUCH NEGLIGENCE MIGHT HAVE BEEN THE CAUSE OF THE INJURY; IT MUST BE SHOWN THAT THE NEGLIGENCE OF THE DEFENDANT MUST HAVE BEEN THE CAUSE.

In a recent English case the facts were as follows:

The dead body of a man was found on the line near the level crossing at night, the man having been killed by a train which carried the usual headlights, but did not whistle or otherwise give warning of its approach. No evidence was given of the circumstances under which the deceased got on to the line.

It was held that, even assuming that there was evi-

dence of negligence on the part of the company, yet there was no evidence to connect such negligence with the accident; that there was, therefore, no case to go to the jury, and that the railway company was not liable.

Wakelin vs. London and Southwestern Ry. Co., L. R., 12 Ap. Cas., 41.

Lord CAIRNS puts a case as a hypothesis:

"If a railway train, which ought to whistle when passing through a station, were to pass through without whistling, and a man were, in broad daylight, and without anything, either in the structure of the line or otherwise, to obstruct his view, to cross in front of the advancing train and to be killed, *I should think the Judge ought to tell the jury that it was the folly and recklessness of the man, and not the carelessness of the company which caused his death.* * * * The jury could not be allowed to connect the carelessness in not whistling with the accident to the man who rushed with his eyes open on his own destruction."

Per Lord CAIRNS in *Dublin, Wicklow and Wexford Ry. Co. vs. Slattery, L. R., 3 Ap. Cas. 1166.*

II.

The Court below did not err in refusing to give to the jury the instructions prayed for by the plaintiffs.

If the instructions of the Court below to the jury to bring in a verdict for defendant was correct, as I have shown (*supra*, Point I.), then it follows of necessity that the instructions prayed for by the plaintiff were wrong, for they involved a submission of this case to the jury upon the evidence.

III.

Reply to the Brief for Plaintiffs.

On the brief of the plaintiffs (*page 4, near the bottom*) is the following remarkable statement: "He (the engineer) was sitting in his cab with his hand (probably) automatically upon the bell-rope, *gazing around with his eyes everywhere but upon the track ahead of him, where they should be.*" This statement, repeated again and again on the plaintiffs' brief, is not only unsupported by any evidence, but is directly contrary to the evidence, as has been shown (*ante, p. 11*). The same statement appears *arguendo* on page 5, near the middle: "Rendered it all the more obligatory in him to keep his eyes on the track"—as if there were any evidence that he did *not* do so. Again, at page 8, near the bottom: "*By not keeping a look-out.*" Again, at page 12, near the middle: "*Without a proper look-out.*"

This is not the only mistake or statement of what was not in evidence, to be found on the plaintiffs' brief. On page 6, near the middle, appears the following: "These spaces (*i. e.*, between the tracks) are never cleared and made a path on which to walk, &c." Now, this statement is not very important in itself, even if true, but it is not only wholly unsupported by the evidence, but the contrary appears from the testimony of J. T. Whedon to be true. He says (*Record, p. 12*): "There are eight feet between the tracks. If both trains were

on the track at the same time there would be a *clear space* of four feet between them." Again: "*The custom is for inspectors to walk between the tracks.*"

Again, at page 11, the plaintiffs' attorneys argue: "It is manifestly not true that the engine and tender was not running at a greater rate of speed than four miles per hour, &c." But Albert Mimick, *a witness for plaintiffs*, testified (*Record, p. 8*): "That engine was running very slow, about four miles an hour," and not only was that testimony uncontradicted in evidence, but no attempt even was made to contradict it. Not only so, but, as we have shown (*ante., p. 8*), other witnesses testified to the slow speed of the engine. This false statement reappears on page 12, about the middle of the page, in this form, in connection with another untrue statement as to the lookout: "We make out the unexpected, and, therefore, clearly the negligence of the defendant, from the fact that its train was run *at undue speed, without a proper lookout*, &c."

I repeat, there is not, so far as I can see, the slightest evidence of negligence on the part of the defendant company or of its servants, and the efforts of the plaintiffs, by false and unsupported statements, to make it appear otherwise can only confirm and strengthen the belief that there was no such evidence.

In regard to the law cited on plaintiffs' brief it is sufficient to say that the authorities do not and cannot successfully controvert these two propositions, which are fully established and which are sufficient to sustain the ruling of the Court below: (1) The Court may and must direct a verdict for the defendant if there is no

evidence of negligence on the part of the defendant to go to the jury; and (2) there was in the present case no evidence of such negligence.

JOHN F. DILLON,
For the Defendant in Error.